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THE PUBLIC'S BURDEN IN A DIGITAL AGE: PRESSURES ON INTERMEDIARIES AND THE PRIVATIZATION OF INTERNET CENSORSHIP

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INTRODUCTION[1]

In the summer of 2010, just as Connecticut Attorney General Richard Blumenthal's U.S. Senate race was heating up,[2] so were his efforts to combat prostitution by targeting websites like Craigslist.[3] A coalition of state attorneys general ("AGs")

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[1] Smith v. California, 361 U.S. 147, 153–54 (1959) ("[I]f the bookseller is criminally liable without knowledge of the contents . . . . [T]he bookseller's burden would become the public's burden . . . . The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered.").

[2] *See Poll: Blumenthal, McMahon, Running Neck and Neck*, WTNH.COM (Sept. 28, 2010, 6:40 AM), http://wtnh.com/dpp/news/politics/poll-blumenthal-mcmahon-running-neck-and-neck.

[3] *See, e.g.*, *Classifieds Website Targeted by Blumenthal Leads Norwalk Police to Prostitution Arrest*, STAMFORD ADVOC. (Feb. 8, 2011), http://www.stamfordadvocate.com/news/article/Classifieds-website-targeted-by-Blumenthal-leads-1002978.php#ixzz1XTtcIPla; Evan Hansen, *Censored! Craigslist Adult Services Blocked in U.S.*, WIRED EPICENTER BLOG (Sept 4, 2010, 11:41 AM), http://www.wired.com/epicenter/2010/09/censored-craigslist-adult-services-blocked-in-u-s/; Steven Musil, *Connecticut AG Subpoenas Craigslist over Sex Ads*, CNET NEWS (May 3, 2010, 10:07 PM),

focused on eradicating online sex crime solicitation, of which Blumenthal was a critical member, had succeeded in getting Craigslist to remove its "erotic services" category the year before and replace it with a more closely monitored "adult services" section.[4] However, recognizing that the switch from "erotic" to "adult" was not enough to curb illegal activity on the site, and in a move that could potentially earn Blumenthal some necessary votes on election day, the AGs succeeded in pressuring Craigslist to remove its adult services section altogether.[5]

In a snarky show of defeat, Craigslist replaced the adult services label with a black bar reading: "censored."[6] While some human rights activists lauded Craigslist's decision to remove the adult services section, some expressed doubt that this action would help combat problems like prostitution and child trafficking at all; instead, critics argued, the censorship of Craigslist would merely exacerbate those problems.[7] Censoring Craigslist ensured that illegal activity would move elsewhere on the Internet,[8] forcing law enforcement personnel to redirect their efforts at infiltrating problem networks—a long, arduous process.[9]

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http://news.cnet.com/8301-1023_3-20004052-93.html.

[4] Brad Stone, *Under Pressure, Craigslist to Remove 'Erotic' Ads*, N.Y. TIMES (May 13, 2009), http://www.nytimes.com/2009/05/14/technology/companies/14craigslist.html.

[5] *See* Thad D., *The Ultimate Showdown:* Blumenthal v. Craigslist, YALE L. & TECH. (Sept. 16, 2010), http://www.yalelawtech.org/net-neutrality/the-ultimate-showdown-blumenthal-v-craigslist.

[6] *See, e.g.*, *id*.

[7] *See* Danah Boyd, *How Censoring Craigslist Helps Pimps, Child Traffickers and Other Abusive Scumbags*, HUFFINGTON POST (Sept. 6, 2010, 8:14 PM), http://www.huffingtonpost.com/danah-boyd/how-censoring-craigslist-_b_706789.html; Audacia Ray, *Craigslist Censorship Won't End Sex Trafficking*, SCAVENGER (Oct. 10, 2010), http://www.thescavenger.net/feminism-a-pop-culture/craigslist-censorship-wont-end-sex-trafficking-67215.html.

[8] *See* Boyd, *supra* note 7. After Craigslist removed its adult services section, traffic spiked at backpage.com, an alternative classified website. Claire Cain Miller, *Craigslist Says It Has Shut Its Section for Sex Ads*, N.Y. TIMES (Sept. 15, 2010), http://www.nytimes.com/2010/09/16/business/16craigslist.html.

[9] Boyd, *supra* note 7; *see also* Ryan Calo, *State AG Threats to Craigslist Implicate Free Speech*, STAN. CENTER FOR INTERNET & SOC'Y (May 19, 2009, 3:33 PM), http://cyberlaw-dev.stanford.edu/node/6185.

In recent years, the regulation of Internet content has fallen into the hands of private companies, often working under intense government pressure. Section 230 of the Communications Decency Act ("CDA"),[10] which immunizes intermediaries like Craigslist from liability for much user-generated content, has clearly not stopped public or private actors from engaging in unwarranted censorship driven by political and societal pressures. In a democratic society, in which progress depends upon the free exchange of ideas, providing citizens with a strong arsenal of digital rights protects them from the suppression of content in Internet spaces. If the United States wishes to remain a leader among democratic nations in promoting freedoms of expression, it must recognize Internet users' rights to the greatest extent possible.

Part I of this Note provides a brief history of Internet censorship, highlighting the stark differences in government policies between the United States and other nations. Part II identifies specific instances of censorship by private intermediaries with a particular focus on the influence of government actors and policies. It explains how private censorship harms marginalized groups and tends to have a more wide-reaching impact than government censorship alone. Part III suggests a combination of legal and normative approaches to protecting freedom of expression online: Part III.A suggests three different ways to apply the First Amendment to Internet speech in privately owned spaces based on existing Supreme Court doctrine; Part III.B argues that in order to advance goals of Internet access, the law must recognize citizens' rights of access to information; and Part III.C argues that intermediaries must commit to higher standards of transparency and accountability in their decision-making processes.

The Note concludes by asserting that the courts' and legislatures' hands-off approach to Internet regulation places too much power in the hands of private intermediaries who lack adequate incentives to protect the rights of citizens engaging with the privately-owned technology. This redistribution of regulatory power requires a stronger set of civil liberties that re-

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[10] Communications Decency Act of 1996, 47 U.S.C. § 230 (2006).

imagines, and to some extent reconstructs, existing First Amendment doctrine for the digital age.

I. CYBERSPACE IN THE UNITED STATES: A HAVEN FOR FREE SPEECH?

While government censorship operates as a roadblock to Internet access in many societies around the world, the United States has stood up against the most oppressive Internet censorship regimes.[11] In its diplomatic efforts, the United States defends Internet access as a fundamental right,[12] and recognizes that the openness of cyberspace is crucial in an information economy in order to ensure innovation.[13] In contrast to the United States, many nations that do not provide their citizens the same free speech protections have garnered negative attention due to their authoritative Internet censorship regimes.[14] North Korea employs the most extreme system. It restricts users to the state-run intranet that consists of a handful of pro-government websites, allowing the government to maintain complete control over the information accessible to its citizens.[15] The Chinese government also uses extreme techniques to censor its citizens. The government pioneered worldwide efforts to filter the Internet[16] and remains notorious for its commitment to

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[11] *See* Ken Stier, *U.S. Girds for a Fight for Internet Freedom*, TIME (Feb. 6, 2010), http://www.time.com/time/nation/article/0,8599,1960477,00.html.

[12] *See* Hillary Rodham Clinton, Sec'y of State, Remarks on Internet Freedom at The Newseum (Jan. 21, 2010), (transcript *available at* http://www.state.gov/secretary/rm/2010/01/135519.htm).

[13] *See* Global Free Flow of Information on the Internet, 75 Fed. Reg. 60,068, 60,068 (Sept. 29, 2010).

[14] *See* Stier, *supra* note 11.

[15] OPENNET INITIATIVE, NORTH KOREA 1–2 (2007), *available at* http://opennet.net/sites/opennet.net/files/north_korea.pdf (last visited Oct. 23, 2011).

[16] Ethan Zuckerman, *Intermediary Censorship*, *in* ACCESS CONTROLLED: THE SHAPING OF POWER, RIGHTS AND RULE IN CYBERSPACE 73, 73 (Ronald J. Deibert et al. eds., 2010), *available at* http://www.access-controlled.net/wp-content/PDFs/chapter-5.pdf.

censorship.[17] While not an exhaustive list, Iran, Tunisia, Syria, Myanmar, and Vietnam also impose strict filtering regimes, censoring content for political, social and other reasons.[18]

However, despite strong free speech rhetoric, some democratic societies have embraced filtering mechanisms as a tool for protecting children from objectionable online content.[19] In the United States, Congress has made several attempts to limit access to online content through legislation, most of which has not survived due to successful First Amendment challenges.[20]

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[17] *See, e.g.*, Austin Ramzy, *Google Ends Policy of Self-Censorship in China*, TIME (Jan. 13, 2010), http://www.time.com/time/world/article/0,8599,1953248,00.html (reporting on Google's decision to stop self-censoring its Chinese-language search engine, which Google had done to appease Chinese authorities that insisted on blocking or filtering the search engine); Stephanie Wang, OPENNET INITIATIVE, CHINA 11 (2009), *available at* http://opennet.net/sites/opennet.net/files/ONI_China_2009.pdf. One unique method allegedly employed by the Chinese government to shape online content was offering a fifty-cent reward for posting pro-government commentary. Stier, *supra* note 11.

[18] *See Global Internet Filtering Map*, OPENNET INITIATIVE, http://map.opennet.net/filtering-pol.html (defaults to "Internet Filtering Political"; view other maps via "Select a Map" menu on left-hand side) (last visited Oct. 23, 2011).

[19] *See* OPENNET INITIATIVE, UNITED STATES AND CANADA 369 (2010), *available at* http://opennet.net/sites/opennet.net/files/ONI_UnitedStatesandCanada_2010.pdf.

[20] The first attempt by Congress to regulate "indecent" and "patently offensive" online communications was found in the Communications Decency Act of 1996. Communications Decency Act of 1996, Pub. L. No. 104-104, tit. V, 110 Stat. 133 (codified as amended at 47 U.S.C. §§ 223, 230, 560–61 (2006)). In 1997, the Supreme Court struck down portions of the CDA that criminalized "indecent" and "patently offensive" online communications. Reno v. ACLU, 521 U.S. 844, 849 (1997) (quoting the CDA). Continuing the pattern, the Court found the Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009-26 to -29, to be overly broad because it abridged the "freedom to engage in a substantial amount of lawful speech." Ashcroft v. Free Speech Coal., 535 U.S. 234, 256 (2002). The Child Online Protection Act ("COPA") was the next major attempt by Congress to criminalize the distribution of indecent online content. Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681-736 (1998), *invalidated by* ACLU v. Gonzales, 478 F. Supp. 2d 775 (E.D. Pa. 2007), *aff'd sub nom.* ACLU v. Mukasey, 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1032 (2009).

While the Supreme Court has demonstrated that it would uphold First Amendment values with fervor in the context of the Internet and would not be overly deferential to government restrictions on Internet speech,[21] the Court has encouraged users to implement their own filtering software based on personal choice.[22] American filtering software companies have thrived and even sell their products to some of the world's most censorial governments.[23]

As Americans increasingly rely on private decision making in lieu of government regulation in the Internet world,[24] the concerns of free speech advocates have shifted from the threat of unconstitutional laws to the role of private actors in censoring the Internet.[25] Public officials no longer must worry about minors' exposure to harmful material online, since intermediaries now decide what content stays and what content goes.[26] For example, if a Facebook user uploads an image that includes nudity, Facebook has the prerogative to censor the image and even suspend the user's account.[27] Similarly, if a

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[21] *See Reno*, 521 U.S. at 868–70 (articulating the reasons for applying strict First Amendment scrutiny to the "vast democratic forums" of the Internet).

[22] In ruling on whether to grant a preliminary injunction preventing enforcement of COPA, the Court concluded that there were less restrictive means—namely user-end filtering—to protect children from harmful content. Ashcroft v. ACLU, 542 U.S. 656, 666–67 (2004).

[23] Internet Service Providers ("ISPs") in the United States also comply with international censorship laws. *See* Kevin Maney, *U.S. Technology Has Been Used to Block, Censor the Net for Years*, USA TODAY (Feb. 21, 2006, 9:55 PM), http://www.usatoday.com/money/industries/technology/maney/2006-02-21-net-censor_x.htm.

[24] *See* Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1116–17, 1121–30 (2005).

[25] *See* JILLIAN C. YORK, OPENNET INITIATIVE, POLICING CONTENT IN THE QUASI-PUBLIC SPHERE (Robert Faris et al. eds., 2010), *available at* http://opennet.net/sites/opennet.net/files/PolicingContent.pdf.

[26] *See* Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 17 (2006).

[27] *See* Michael ONeil, *Facebook Doesn't "Like" Nude Art*, BLOGGING CENSORSHIP (Feb. 23, 2011, 7:11 PM), http://ncacblog.wordpress.com/2011/02/23/facebook-doesnt-like-nude-art/.

YouTube user uploads a video that samples copyrighted material, YouTube may remove the video even if it is clearly a fair use.[28] It is the website's terms of service agreement, not the United States Constitution, that governs speech on intermediated websites.[29] And in a capitalistic society, in which private companies own and maintain the Internet's infrastructure, the gatekeeping role of non-governmental actors goes largely unchallenged.[30]

II. THREATS TO FREE SPEECH ON A PRIVATIZED INTERNET: THE VAST SELF-REGULATORY POWERS OF INTERMEDIARIES

As Internet users spend less of their time passively consuming material and more time generating and sharing content,[31] more privately owned social networks and publishing platforms must act as intermediaries between content creators and their audience.[32] Every interactive website has its own "terms of use" or "terms of service" agreement to regulate the types of information individuals can post.[33] Though intermediaries are largely shielded from liability for third-party content,[34] various factors drive private actors to censor content.[35]

Those who believe the Internet should be free from regulation might question which version of cyberspace is more desirable for a free republic: one where narrowly tailored, constitutional legislation controls online speech or one over which the government is able to exert its influence and control by pressuring private intermediaries to censor content on the

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[28] *See infra* Part II.C.2.

[29] *See infra* Part II.

[30] *See* Nunziato, *supra* note 24.

[31] *See, e.g.*, URS GASSER & JOHN PALFREY, BORN DIGITAL 112 (2008); Brian Womack, *Social Networking and Games Leap in Web Use*, BUSINESSWEEK (Aug. 2, 2010, 12:01 AM), http://www.businessweek.com/technology/content/aug2010/tc2010081_994774.htm.

[32] *See* Kreimer, *supra* note 26, at 16–17.

[33] Nunziato, *supra* note 24, at 1121–22.

[34] *See infra* Part II.C.1 (discussing Section 230 of the CDA).

[35] *See infra* Part II.A–C.

government's behalf.[36] While narrowly tailored government regulations tend to target a specific demographic,[37] decisions by a private company to filter much more broadly defined content have the capacity to reach a far larger segment of the population[38] and could therefore present greater long-term dangers to free speech than government restrictions.

A. Pressure from State Actors

As suggested in the Introduction to this Note, the private companies that control the Internet's infrastructure have varying levels of tolerance for public pressure.[39] For example, Craigslist is a private website that has buckled to government pressure to censor content.[40] In 2009, a Boston University medical student—now known as "The Craigslist Killer"—was arrested for the murder of a masseuse whom he hired after seeing her advertisement on the popular online classified site.[41] The case generated nationwide headlines and tapped into public fears that Craigslist would facilitate dangerous encounters,[42] giving rise to

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[36] *See* Kreimer, *supra* note 26, at 77 (arguing that "proxy censorship" is more intrusive than direct regulation from a First Amendment standpoint, and should be used "only as a last resort"); *see also* Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311, 342 (2011).

[37] See *supra* Part I and *infra* Part II.C.3, for a discussion of regulations enacted to shield content from children. See *infra* Part II.C for a discussion of other regulations targeted at specific individuals, such as trade sanctions.

[38] *See infra* Part II.A–C.

[39] *Censorship in the Age of Facebook and Twitter*, NAT'L CONF. FOR MEDIA REFORM (Apr. 8, 2011), http://conference.freepress.net/session/469/censorship-age-facebook-and-twitter (including the remarks of Yochai Benkler, Berkman Professor for Entrepreneurial Legal Studies, Harvard Law School).

[40] *See supra* Introduction.

[41] Eric Moskowitz, *Alleged "Craigslist Killer" Recalled as a Nice, Smart Boy*, BOS. GLOBE (Apr. 21, 2009, 8:46 PM), http://www.boston.com/news/local/breaking_news/2009/04/alleged_craigsl.htm; Jonathan Saltzman & Maria Cramer, *BU Student Charged in Hotel Killing*, BOS. GLOBE (Apr. 21, 2009), http://www.boston.com/news/local/massachusetts/articles/2009/04/21/bu_student_charged_in_hotel_killing.

[42] *See* Frank Owen, *The Craigslist Crime Wave*, MAXIM (July 22, 2009, 11:50 AM), http://www.maxim.com/stuff/articles/83043/craigslist-crime-wave.

the first successful attempt by state AGs to pressure Craigslist to censor its erotic content.[43]

Ironically, Craigslist was key to helping law enforcement officials identify the Craigslist killer, who without that intermediary would likely have found his victims in a more underground venue—whether online or offline—and would not have been as easy to trace.[44] Craigslist's eventual decision to block its adult services section entirely, therefore, harms not only the speakers seeking to offer legitimate adult services through the site, but also impedes lawmakers in their efforts to locate criminals using the popular site.[45]

Another major recent incident of government-induced private censorship occurred after the release of troves of confidential diplomatic cables by the watchdog organization Wikileaks.[46] Upon learning that Wikileaks' website was hosted on Amazon's cloud servers, Senator Joseph Lieberman had his staffers call Amazon to inquire; shortly after, Amazon reported back that it was no longer hosting Wikileaks.[47] Lieberman also released a statement "call[ing] on any other company or organization that [was] hosting Wikileaks to immediately terminate its relationship with them."[48] Soon after, EveryDNS, the American company that provided Wikileaks' domain name, also terminated its services to Wikileaks, forcing it to move its domain name registration to Switzerland.[49] The iPhone also pulled its Wikileaks app, and various payment processors cut Wikileaks off.[50] Some of these services tried to deny that their reasons for censoring Wikileaks were government-related, and instead

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html.

[43] Stone, *supra* note 4.

[44] *See* Calo, *supra* note 9.

[45] Boyd, *supra* note 7.

[46] Benkler, *supra* note 36, at 26.

[47] Rachel Slajda, *How Lieberman Got Amazon to Drop Wikileaks*, TALKING POINTS MEMO (Dec. 1, 2010, 5:56 PM), http://tpmmuckraker.talkingpointsmemo.com/2010/12/how_lieberman_got_amazon_to_drop_wikileaks.php.

[48] Benkler, *supra* note 36, at 23.

[49] *Id.* at 24.

[50] *Id.* at 24–25.

attributed the termination to terms of service violations.[51] Only one web application that provided a platform for interactive graphics to Wikileaks directly cited Lieberman's letter as its motivation for removing service to Wikileaks.[52] Under the First Amendment, Congress could not have obtained an injunction against the release of the Wikileaks cables[53]—instead, its members worked in concert with private actors to accomplish a form of censorship that had no possibility of judicial review.[54]

Since the Internet is a global medium, censorship decisions by American entities can reverberate to other nations. For example, much of the activity that the anti-Craigslist coalition of AGs sought to address while pressuring Craigslist were sex crimes subject to American law enforcement, but their actions have influenced officials beyond our borders.[55] In Canada, where prostitution is legal, the government took cues from the adult services crackdown in the United States and began making its own appeals to Craigslist to remove Canadian erotic services websites.[56] Due to Canada's more lenient sex industry laws, the move sparked a much greater public outcry of censorship than in the United States.[57] Sex workers there expressed concern that forcing their industry underground by censoring Craigslist would further marginalize consensual adult workers while compromising efforts to fight child exploitation.[58]

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[51] *Id.* at 23, 25.

[52] Glenn Greenwald, *More Joe Lieberman-Caused Internet Censorship*, SALON.COM (Dec. 2, 2010, 4:03 PM), http://www.salon.com/news/opinion/glenn_greenwald/2010/12/02/censorship/index.html.

[53] *Censorship in the Age of Facebook and Twitter*, *supra* note 39.

[54] Benkler, *supra* note 36, at 26.

[55] *See, e.g.*, Rob Breakenridge, *Ending Sex Ads on Craigslist Helps No One*, CALGARY HERALD (Oct. 26, 2010), http://www2.canada.com/Calgaryherald/news/theeditorialpage/story.html?id=1836ad3b-0d48-4d1a-b0de-84f4aab34e3b&p=1; Eric Veillette, *Bans on Escort Ads May Erode Free Speech Rights*, TORONTO STAR (Oct. 31, 2010), http://www.thestar.com/article/883367--bans-on-escort-ads-may-erode-free-speech-rights.

[56] *See* Breakenridge, *supra* note 55.

[57] *See* Veillette, *supra* note 55.

[58] Joanna Chiu, *Craigslist, Sex Work, and the End of "Innocence?": Why Our Efforts to Address Sex Work Are Misguided*, RH REALITY CHECK (Nov. 8, 2010, 11:53 AM), http://www.rhrealitycheck.org/blog/2010/11/08/sex-

After United States government officials exerted pressure on American companies to cut off access to Wikileaks, the site migrated to servers in France. The French government, however, followed the United States' lead, calling upon French companies to deny service to Wikileaks.[59] If it were not for Wikileaks' allies, who had already mobilized to ensure that the documents would be duplicated on other servers, the entire world would have felt the effects.[60] The incident underscores the importance of preventing future censorship in a country where many of the world's major Internet Service Providers are located.

B. Circumvention of Network Neutrality Principles

Network neutrality—the principle that all web content, sites, and platforms should be equally accessible[61]—plays an important role in the anti-censorship debate.[62] For many years, Internet Service Providers, which include corporate giants like AT&T and Verizon, have lobbied Congress to be able to charge website operators based on the amount of bandwidth they use;[63] those intermediaries would then arguably pass the costs along to

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work-craigslist.

[59] Benkler, *supra* note 36, at 24.

[60] *See* Ravi Somaiya, *Hundreds of Wikileaks Mirror Sites Appear*, N.Y. TIMES (Dec. 5, 2010), http://www.nytimes.com/2010/12/06/world/europe/06wiki.html.

[61] *See* Tim Wu, *Network Neutrality FAQ*, TIM WU, http://timwu.org/network_neutrality.html (last visited Oct. 23, 2011).

[62] *See, e.g.*, Caroline Frederickson, *Perspective: Net Neutrality or Net Censorship?*, CNET (July 24, 2006, 9:35 AM), http://news.cnet.com/Net-neutrality-or-Net-censorship/2010-1028_3-6097579.html (making quintessential free speech arguments in favor of net neutrality); Clothilde Le Coz, *eG8 Fails to Protect Net Neutrality, Online Censorship*, PBS MEDIASHIFT (June 3, 2011), http://www.pbs.org/mediashift/2011/06/eg8-fails-to-protect-net-neutrality-online-censorship154.html ("[W]ithout a conversation about Net neutrality or even a mention of the role private companies play in censorship, what came out of the eG8 [summit] lacked the teeth needed to truly encourage free speech around the globe.").

[63] *See Network Neutrality*, FREEPRESS, http://www.freepress.net/policy/internet/net_neutrality (last visited Oct. 23, 2011).

Internet users.[64] In December 2010, the Federal Communications Commission ("FCC") passed a set of rules intended to protect network neutrality—the idea that customers will only have to pay one price for Internet service regardless of the content they access.[65] However, the rules are "riddled with loopholes" and Internet advocates worry they do not amount to protection of net neutrality principles at all.[66]

In essence, supporters of a free and open Internet worry that the Internet will no longer protect innovation and non-discrimination if there is no rigid system in place mandating neutrality.[67] Critics of the new FCC rules point primarily to the lack of an explicit mandate against "paid prioritization"[68] and a lack of protections for the "mobile web"—the Internet accessible via cellular phones and other mobile devices—which in some communities is the only reliable means of accessing the Internet.[69] Currently, mobile carriers targeting low-income communities—MetroPCS in particular—face accusations of content discrimination.[70] Among other deficiencies in service,[71]

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[64] *Net Neutrality 101*, SAVETHEINTERNET, http://www.savetheinternet.com/net-neutrality-101 (last visited Oct. 23, 2011).

[65] *See* Brian Stelter, *F.C.C. Approves Net Rules and Braces for Fight*, N.Y. TIMES MEDIA DECODER BLOG (Dec. 21, 2010, 1:55 PM), http://mediadecoder.blogs.nytimes.com/2010/12/21/f-c-c-approves-net-rules-and-braces-for-fight/.

[66] Abigail Phillips, *Genachowski Wins on Net Neutrality, Sort Of*, ELECTRONIC FRONTIER FOUND. (Dec. 23, 2010, 4:39 PM), https://www.eff.org/deeplinks/2010/12/genachowski-wins-sort.

[67] *Net Neutrality 101*, *supra* note 64.

[68] Stelter, *supra* note 65.

[69] Hart Van Denburg, *Al Franken: Net Neutrality Rules Permit Political Censorship*, CITYPAGES' BLOGS (Dec. 21, 2010, 2:27 PM), http://blogs.citypages.com/blotter/2010/12/al_franken_fear.php.

[70] Letter from M. Chris Riley, Counsel, Free Press, to Julius Genachowski, Chairman, Fed. Commc'ns Comm'n (Jan. 10, 2011), *available at* http://www.freepress.net/files/MetroPCS_Letter_1_10_11.pdf.

[71] Community Voice Line, a content provider, has instituted a lawsuit against MetroPCS in the Northern District of Iowa that alleges discriminatory call blocking practices. Complaint at 4, Cmty. Voice Line, L.L.C. v. MetroPCS Commc'ns, Inc., No. 5:2011-cv-04019-MWB (N.D. Iowa Feb. 22, 2011). The district court dismissed the case for lack of jurisdiction. Order Regarding Defendant's Motion to Dismiss and Plaintiff's Motion for

lower-end subscribers to MetroPCS have limited access to mobile Internet content.[72] As the FCC net neutrality rules stand today, nothing prevents companies like MetroPCS from picking and choosing among internet content so that low-income citizens, who often rely on mobile devices to access the Internet, are unable to access certain online services.[73]

Without network neutrality, corporations are free to create a tiered Internet, where websites with deeper pockets will receive priority.[74] Practically speaking, that means that independent musicians, bloggers, and Internet startups would all face an uphill battle trying to establish a web presence because they would be forced to compete with major content providers.[75] Without strong regulations in place to ensure net neutrality, private actors are free to continue inhibiting access to the web.

C. Increasing the Impact of Government Regulations Through Over-Compliance with Existing Laws

As discussed in Part I, the United States government has imposed few Internet filtering mandates on its citizens, for two reasons. First, U.S. policies generally promote Internet innovation. Second, the United States' strong free speech protections have led the Supreme Court and state courts to

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Temporary Restraining Order at 5, Cmty. Voice Line, L.L.C. v. MetroPCS Commc'ns, Inc., No. 5:2011-cv-04019-MWB (N.D. Iowa Feb. 25, 2011).

[72] Press Release, Free Press, Public Interest Groups Call on FCC to Investigate MetroPCS for Internet Blocking (Jan. 11, 2011), *available at* http://www.freepress.net/press-release/2011/1/11/public-interest-groups-call-fcc-investigate-metropcs-internet-blocking.

[73] The FCC rules prohibit mobile carriers from "blocking applications that compete with the providers' voice or video telephony services, subject to reasonable network management." Critics argue the "reasonable network management" exception provides a "gaping loophole" in the rules. Ryan Singel, *MetroPCS 4G Data-Blocking Plans May Violate Net Neutrality*, WIRED (Jan. 7, 2011, 10:41 AM), http://www.wired.com/epicenter/2011/01/metropcs-net-neutrality/ (quoting Preserving the Free and Open Internet, 76 Fed. Reg. 59192, 59232 (Sept. 23, 2011) (to be codified at 47 C.F.R. pt. 8.5(b)).

[74] *Net Neutrality 101*, *supra* note 64.

[75] *Id.*

overturn several short-lived Internet regulations. However, there are still a handful of Internet regulations on the books which, taken together, have a detrimental effect on free speech. This is largely because, in order to mitigate risk, many online service providers over-comply with existing laws.[76] For example, intermediaries over-comply with Section 230 of the CDA ("Section 230"),[77] the Digital Millennium Copyright Act ("DMCA"),[78] the Children's Internet Protection Act ("CIPA")[79] and international trade sanctions. This over-compliance often amounts to a form of government pressure on private companies.

1. Section 230

One of the most significant ways that the United States protects speech on the Internet is through Section 230 of the CDA.[80] In 1995, Congress drafted Section 230 in part to preserve the Internet as a "forum for . . . political discourse, unique opportunities, for cultural development, and myriad avenues for intellectual activity."[81] The speech-chilling effect of an Internet in which providers were obligated to take down every piece of allegedly defamatory content would be profound.[82] Ironically, the Supreme Court overturned much of

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[76] CTR. FOR DEMOCRACY & TECH., INTERMEDIARY LIABILITY: PROTECTING INTERNET PLATFORMS FOR EXPRESSION AND INNOVATION 4–5 (2010), *available at* http://www.cdt.org/files/pdfs/CDT-Intermediary%20Liability_(2010).pdf.

[77] *See generally* Communications Decency Act, 47 U.S.C. § 230 (2006) (allowing the provider to block access to content it deems to be objectionable regardless of constitutional protection).

[78] *See generally* Digital Millennium Copyright Act, Pub. L. No. 105–304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 5, 17, 22 U.S.C. (2006)) (defining scope and limitations of copyright protection for digital media).

[79] *See generally* Children's Internet Protection Act of 2000, 20 U.S.C. § 9134(f); 47 U.S.C. § 254(h)(6) (requiring restriction on Internet access of minors to certain harmful materials).

[80] § 230(c)(1).

[81] § 230(a)(3)–(b).

[82] *See* Joyce E. Cutler, *Counsel at Leading Social Sites Describe Crush*

the rest of the CDA due to its First Amendment problems, but Section 230 survived[83] and has arguably become a critical component of the Internet as we know it today.[84] In countries that do not have statutes with the equivalent force of Section 230, intermediary liability for user-generated content has seriously chilled online speech.[85]

However, recent research suggests that Section 230 may not be entirely effective at protecting online speech.[86] In court cases where intermediaries use Section 230 as their defense, it is successful only two-thirds of the time.[87] Part of this is because content regulated by federal criminal and intellectual property laws is excluded from Section 230's protections. Under § 230(e)(1), interactive service providers like Craigslist may be federally prosecuted for third-party criminal content on their websites.[88] This exposure to criminal liability is undoubtedly a major reason why Craigslist succumbed to government pressure to comply with state actors threatening prosecution.[89] Though courts have thus far limited § 230(e)(1) to criminal prosecutions, some commentators have advocated for holding service providers civilly liable under criminal statutes for illegal user-generated content.[90]

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of User Content Takedown Requests, BNA E-COM. & TECH L. BLOG (Mar. 7, 2011), http://pblog.bna.com/techlaw/2011/03/counsel-at-leading-social-sites-describe-crush-of-user-content-takedown-requests.html.

[83] David. S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 411 (2010).

[84] *Id.*

[85] Mike Masnick, *Does Section 230 Need Fixing?*, TECHDIRT (June 15, 2010, 3:34 PM), http://www.techdirt.com/articles/20100614/0030419801.shtml.

[86] Ardia, *supra* note 83, at 373–74.

[87] *Id.* at 492.

[88] *See* Shahrzad T. Radbod, *Craigslist—A Case for Criminal Liability for Online Service Providers?*, 25 BERKELEY TECH. L.J. 597, 612–13 (2010).

[89] *See* Calo, *supra* note 9 (suggesting that the expense of a potential trial contributed to Craigslist's decision to succumb to government pressure). Since § 230(e)(1) refers only to federal criminal law, courts have found that the provision does not affect intermediaries' § 230 immunity under state criminal laws. *Id.*

[90] Some federal criminal statutes provide for civil remedies. *See* Katy

Uncertainty in the law also exists as to whether the intellectual property exclusion found in § 230(e)(2) is limited to federal intellectual property laws or also includes state laws. Using this loophole, plaintiffs have argued successful right of publicity claims against intermediaries, since that particular cause of action is rooted in a state-based intellectual property right.[91]

Apart from the legal loopholes, intermediaries have plenty of reason to comply with content takedown requests: they have business incentives to both keep their customers happy and avoid costs of potentially frivolous litigation brought by plaintiffs.[92] As a result, websites do not always ignore users' requests to take down content despite the legal immunity they receive under Section 230.[93] Thus, despite Section 230's protective shield for intermediaries, they continue to voluntarily police speech.

2. The DMCA

The DMCA, which was enacted to address online copyright issues and implement the World Intellectual Property Organization (WIPO) treaties of 1996,[94] contains several

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Noeth, *The Never-Ending Limits of § 230: Extending ISP Immunity to the Sexual Exploitation of Children*, 61 FED. COMM. L.J. 765, 782–83 (2009) (citing 18 U.S.C. § 2252(a) (2006)). In *Doe v. Bates*, a magistrate judge refused to accept the plaintiff's argument that Section 230 allows for civil remedies against ISPs under § 2252(a), a child pornography statute, "because of the context of § 230(e)(1) and the common definitions of three terms: 'criminal,' 'civil,' and 'enforcement.'" *Id.* (citing Doe v. Bates, No. 5:05-CV-91, 2006 WL 3813758 at *20-22 (E.D. Tex. Dec. 27, 2006) (Craven, Mag. J., Report and Recommendation)).

[91] *Compare* Doe v. Friendfinder Network, Inc., 540 F. Supp. 2d 288 (D.N.H. 2008), *with* Perfect 10, Inc. v. CCBill L.L.C., 488 F.3d 1102 (9th Cir. 2007).

[92] *See* Calo, *supra* note 9 (arguing that Craigslist did not seriously fear a successful lawsuit but rather the costs of litigation and negative publicity); *see also* Ardia, *supra* note 83, at 481–82 (discussing companies' desire to avoid meritless litigation).

[93] *See generally* Ardia, *supra* note 83.

[94] U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998, at 1 (1998), *available at* http://copyright.gov/legislation/dmca.pdf.

provisions that arguably endanger users' free speech rights.[95] These provisions include anti-circumvention provisions[96] and notice-and-takedown provisions.[97] The notice-and-takedown provisions create a mechanism whereby intermediaries may become immune from liability for copyright-infringing material posted by users if they comply with procedures designated by the statute.[98] One practical result of the notice-and-takedown provisions is that intermediaries enforcing them fail to account for whether a particular user-generated work is a fair use.[99] In one specific example of over-compliance in the context of the DMCA, YouTube allegedly received several takedown notices in connection with videos uploaded by Senator John McCain's 2008 presidential campaign.[100] When the McCain campaign contacted YouTube about its omission of fair use government speech, YouTube admitted that it simply had no way to assess the fair use value of each video uploaded, and so it removed all videos for which it received takedown notices in order ensure DMCA compliance.[101] Due to liability fears under the DMCA, self-censorship is common not only among intermediaries, but

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[95] *See* FRED VON LOHMANN, ELEC. FRONTIER FOUND., UNINTENDED CONSEQUENCES: TWELVE YEARS UNDER THE DMCA 2 (2010) [hereinafter UNINTENDED CONSEQUENCES], *available at* http://www.eff.org/files/eff-unintended-consequences-12-years.pdf; Fred Von Lohmann, Senior Copyright Attorney, Google, Open Video Conference Panel: Beyond the Copyright Wars (Oct. 1, 2010) [hereinafter Beyond the Copyright Wars] ("You can't bake a federal judge onto a computer chip.").

[96] *See* UNINTENDED CONSEQUENCES, *supra* note 95, at 1.

[97] *See* Beyond the Copyright Wars, *supra* note 95. "Fair use" is the copyright defense available for transformative works. Copyright Act of 1976, 17 U.S.C. § 107 (2006).

[98] Digital Millennium Copyright Act, 17 U.S.C. § 512(c) (2006).

[99] *See* Beyond the Copyright Wars, *supra* note 95.

[100] Declan McCullagh, *McCain Campaign Protests YouTube's DMCA Policy*, CNET (Oct. 14, 2008, 5:20 PM), http://news.cnet.com/8301-13578_3-10066510-38.html (surmising that at least one of these take-down notices came from CBS, whose content the campaign had excerpted in one of its videos uploaded to YouTube).

[101] Letter from Zahavah Levine, Chief Counsel, YouTube, to Trevor Potter, General Counsel, McCain-Palin 2008 (Oct. 14, 2008) [hereinafter YouTube Letter], *available at* http://www.eff.org/files/08-10-14YouTube%20Response%20to%20Sen.%20McCain.pdf.

also among individuals looking to share and upload their content to the Internet, including journalists, scientists, students, and researchers.[102]

3. CIPA

Some free speech limitations come directly from statutes aimed at protecting children. Though much of the legislation enacted in the early 2000s to protect children from online threats did not survive constitutional challenges,[103] Congress finally succeeded at passing a law limiting Internet users' access to "harmful" material—CIPA.[104] CIPA requires public schools and libraries receiving federal e-rate funding for Internet access to install software on their computers to filter out "harmful" content.[105] When library associations filed suit to challenge the law as it applied to public libraries, the Supreme Court upheld CIPA as a constitutional condition on receiving federal funds.[106]

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[102] Fred von Lohmann, *Measuring the Digital Millennium Copyright Act Against the Darknet: Implications for the Regulation of Technological Protection Measures*, 24 LOY. L.A. ENT. L. REV. 635, 647 (2004); *see also* UNINTENDED CONSEQUENCES, *supra* note 95, at 2–9.

[103] *See supra* notes 20–22 and accompanying text.

[104] Children's Internet Protection Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763, 2763A-335 (codified as amended at 20 U.S.C. § 9134(f) (2006); 47 U.S.C. § 254(h)(6) (2006)).

[105] 47 U.S.C. § 254(h)(6). The term "harmful to minors" is defined as:

> any picture, image, graphic image file, or other visual depiction that—(i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion; (ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and (iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.

20 U.S.C. § 9134(f)(7)(B).

[106] United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 214 (2003). Though the ruling applied to libraries, "it was generally assumed that if the Supreme Court struck down CIPA for public libraries on First Amendment grounds, a similar challenge would [have been] mounted in connection with public schools." Katherine A. Miltner, *Discriminatory Filtering: CIPA's Effect on Our Nation's Youth and why the Supreme Court Erred in Upholding*

However, critics of filters in schools point to the tendency of filtering technology to under-block, over-block,[107] and generally curtail teachers' ability to motivate students via all possible avenues.[108]

There are certainly legitimate concerns that filters attempt to address, such as security concerns, and fears of improper behavior like cyberbullying.[109] Furthermore, it is hardly objectionable that students should be restricted from accessing certain types of content during the school day. But there are other ways to prevent students from accessing certain websites when they should not be—for example, schools could create Internet usage policies and enforce violations against students who abuse their privileges, and teachers, librarians, or other school employees could monitor and assist students while they surf the web.[110]

Instead, public schools and libraries often block much more content than CIPA requires, from legitimate educational websites to social networks that may be helpful to classroom learning, because they outsource their filtering needs to private companies that inevitably categorize content subjectively.[111] These filters act as barricades to the digital playground where youth spend much of their time outside of school, and preclude the opportunity to

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the Constitutionality of the Children's Internet Protection Act, 57 FED. COMM. L.J. 555, 575 (2005).

[107] *See, e.g.*, MARJORIE HEINS ET AL., BRENNAN CTR. FOR JUSTICE, INTERNET FILTERS: A PUBLIC POLICY REPORT 9–39 (2006), *available at* http://www.fepproject.org/policyreports/filters2.pdf.

[108] NAT'L COAL. AGAINST CENSORSHIP, THE FIRST AMENDMENT IN SCHOOLS: AN OVERVIEW 1, 5–7 (2008), *available at* http://www.ncac.org/images/ncacimages/First%20Amendment%20in%20Schools-An%20Overview.pdf.

[109] Michelle R. Davis, *Social Networking Goes to School*, EDUC. WK. (June 14, 2010), http://www.edweek.org/dd/articles/2010/06/16/03networking.h03.html.

[110] Michael J. Brown, *The Children's Internet Protection Act: A Denial of a Student's Opportunity to Learn in a Technology-Rich Environment*, 19 GA. ST. U. L. REV. 789, 847 (2003).

[111] HEINS ET AL., *supra* note 107, at 1–3 (2006). "By delegating blocking decisions to private companies, CIPA thus accomplished far broader censorship than could be achieved through a direct government ban." *Id*. at 3.

teach students the proper rules of play, such as online etiquette.[112] In many low-income communities, schools and libraries are the primary location where youth can access the Internet; as such, strict filtering regimes also tend to exacerbate the digital divide.[113]

Too often, students miss out on learning opportunities due to over-blocking.[114] One teacher explained how an Internet filter robbed her of a valuable new media literacy teaching opportunity when her student unknowingly brought in a printout

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[112] *See* ONLINE SAFETY & TECH. WORKING GRP., YOUTH SAFETY ON A LIVING INTERNET 19–20 (2010), *available at* http://www.ntia.doc.gov/reports/2010/OSTWG_Final_Report_060410.pdf. The report likens the failure of schools to provide teens with adequate "coaching" for social media to children growing up without "organized sports programs in schools." Without coaching, youth never learn to "avoid unsportsmanlike conduct [or] learn to slide home without skinning their knees." *Id.* at 20; *see also* COMM. TO STUDY TOOLS & STRATEGIES FOR PROTECTING KIDS FROM PORNOGRAPHY, NAT'L RESEARCH COUNCIL, YOUTH, PORNOGRAPHY AND THE INTERNET 9, 224 (Dick Thornburgh & Herbert S. Lin eds., 2002) (analogizing the use of Internet filters to building fences around a swimming pool, and asserting that teaching children how to swim would serve them better in the long run).

[113] SAMANTHA BECKER ET AL., INST. OF MUSEUM & LIBRARY SERVS., OPPORTUNITY FOR ALL: HOW THE AMERICAN PUBLIC BENEFITS FROM INTERNET ACCESS AT U.S. LIBRARIES 2 (2010), *available at* http://www.gatesfoundation.org/learning/Documents/OpportunityForAll.pdf (surveying public library use among Americans fourteen years and older). This is especially so in schools that qualify for e-rate funding (and are thus bound by CIPA). These schools are are often in low-income areas. *E-Rate Program – Discounted Telecommunications Services – Office of Non-Public Education*, U.S. DEP'T EDUC., http://www2.ed.gov/about/offices/list/oii/nonpublic/erate.html (last visited Oct. 23, 2011) (explaining that e-rate eligibility is measured by number of students who qualify for school lunch program); *see also* ANGELE A. GILROY, CONG. RESEARCH SERV., IB 98040, TELECOMMUNICATIONS DISCOUNTS FOR SCHOOLS AND LIBRARIES: THE "E-RATE" PROGRAM AND CONTROVERSIES, at CRS-7 (2005), *available at* http://ipmall.info/hosted_resources/crs/IB98040_050506.pdf ("Citing [research that shows] a decreasing but continuing disparity in access to computers and online services by race and income, supporters also claim that this program is needed to help bridge the divide between information 'haves and have nots' and ensure access to communities that may otherwise be left behind.").

[114] ALAN C. NOVEMBER, WEB LITERACY FOR EDUCATORS 37 (2008).

from a white supremacy website for Martin Luther King Day.[115] When she tried to pull up the website in the classroom to investigate, it was blocked—yet it was the first result that Google displayed upon a search of "Martin Luther King."[116] She said that the experience "made me really question the role of filters. The majority of my students have access to the Internet outside of school. I figure somehow there needs to be a balance between protecting them through filters and teaching them how to question everything they read."[117]

Filters also impede rather than enhance youth safety online. A commission set up by Congress suggested that blocking social media sites in schools might have a "negative effect on student safety" because it precludes the opportunity to place Internet safety lessons in the proper context. [118] Filtering, in other words, may stand as a barrier to protecting our nation's youth from cyberbullying and other dangers associated with adolescents' use of the Internet.[119]

4. Trade Sanctions

In a final example of private entities implementing policies that are far broader than what the law requires, American export rules have pressured some private companies to exercise a form of self-censorship.[120] One American resident's website was shut down by the web hosting service Bluehost because it contained a blog for the Belarussian American Association, and Belarus is subject to American trade sanctions.[121] Bluehost also overzealously disabled several Zimbabwean human rights activism sites in order to comply with United States Treasury

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[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] ONLINE SAFETY & TECH. WORKING GRP., *supra* note 112, at 24–25.

[119] *Id.*

[120] Evgeny Morozov, *U.S. Web Firms Practice Self-Censorship*, DAILY BEAST (Mar. 6, 2009, 7:00 PM), http://www.newsweek.com/2009/03/06/do-it-yourself-censorship.html#.

[121] *Id.*

Department restrictions.[122] While American trade laws are somewhat unclear on this point, they are explicit about applying only to websites engaged in "undermining democratic institutions" in Zimbabwe—and thus clearly did not apply to human rights groups.[123] After the censored Zimbabweans mounted a campaign against Bluehost, the United States Treasury Department stepped in and instructed Bluehost to reactivate the disabled websites.[124]

Bluehost is not the only service provider structuring policies around American trade sanctions. For a period of time, LinkedIn was blocking all Syrian users until, as with the Zimbabweans, the Syrians challenged the policy and got their accounts back.[125] While intermediaries may have different reasons for over-complying with laws and regulations, the underlying issue is the same: private companies have little motivation to protect users' speech, and a great deal of motivation to avoid government sanctions. Federal laws that restrict speech on the Internet can be subject to an immediate injunction and then struck down through judicial review. When private intermediaries act under pressure or on their own accord to censor content beyond what the law requires, it can pose a more lasting threat to Internet freedom. This subtler form of censorship, immune from legal challenge, leaves affected Internet users with little recourse.

III. THE ROAD TO UNFETTERED INTERNET ACCESS: ESTABLISHING RIGHTS TO SPEECH, ACCESS, AND TRANSPARENCY IN ONLINE SPACES

The First Amendment, as the courts have interpreted it for the past one hundred years, may not lend proper guidance to dealing with issues of Internet censorship.[126] In the twentieth

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[122] Zuckerman, *supra* note 16, at 74–75.

[123] *Id*.

[124] *Id*. at 76.

[125] *Id*.

[126] Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 427 (2009).

century, when free speech doctrines developed in the courts, the seminal cases often concerned media institutions facing censorship by state and federal actors,[127] or street protestors and leafletters facing censorship by local governments.[128] The values of the First Amendment remain stronger than ever in this new media age, but now taking one's message to the streets is not nearly as common or powerful as taking it to Twitter. Accordingly, it is time for a different system for protecting First Amendment principles[129] that takes into consideration a new set of values for the information economy: speech, access, and transparency.

A. Speech

Though courts have heavily scrutinized government regulations of Internet speech, as discussed in Part I, they have not thus far subjected regulations by private Internet companies to the same level of scrutiny.[130] Since "[a] system of free speech depends not only on the mere absence of state censorship, but also on an infrastructure of free expression,"[131] citizens must receive more protection for their speech than they currently receive in privately owned spaces.

1. The "State Action" Doctrine

Many private intermediaries have state-like functions in their control over cyberspace, and therefore should be treated like government actors when they engage in censorship. The federal

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[127] *See, e.g.*, N.Y. Times v. United States, 403 U.S. 713 (1971); N.Y. Times v. Sullivan, 376 U.S. 254 (1964).

[128] *See, e.g.*, Chaplinksy v. New Hampshire, 315 U.S. 568 (1941); Cantwell v. Connecticut, 310 U.S. 296 (1940).

[129] *See* Balkin, *supra* note 126, at 427–28 ("[I]n the twenty-first century, the values of freedom of expression will become subsumed under an even larger set of concerns that I call knowledge and information policy.").

[130] David L. Hudson Jr., *What's on the Horizon*, FIRST AMENDMENT CTR., http://archive.firstamendmentcenter.org/petition/..%5C/speech/internet/horizon.aspx?topic=Internet (last updated Oct. 2008).

[131] Balkin, *supra* note 126, at 432.

courts have recognized that citizens may be entitled to First Amendment protections against private speech restrictions. The "state action" doctrine dictates that constitutional limits apply only to governmental entities and not private parties, but courts have found that "if the government has so involved itself, either by providing incentives, encouragement, or resources, with private behavior," then the private parties' conduct may be subject to constitutional scrutiny.[132] In *Marsh v. Alabama*, an early state action case, the Supreme Court held that when a private entity owns a town it must guarantee the same fundamental constitutional rights to the town's residents that are afforded to residents of traditional municipalities, including free speech rights.[133] In a sense, the Internet has become a world of company towns in which these intermediaries enforce their own laws[134]—except unlike traditional company towns, hundreds of millions of people inhabit many of these cyberspaces.[135]

In the federal cases thus far in which plaintiffs have argued for private Internet intermediaries to be treated as government actors,[136] their arguments have been unconvincing to courts. In

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[132] Matthew L. Spitzer, *An Introduction to the Law and Economics of the V-Chip*, 15 CARDOZO ARTS & ENT. L. J. 429, 437, 439 (1997).

[133] Marsh v. Alabama, 326 U.S. 501 (1946).

[134] For an argument that the *Marsh* analysis should apply to Internet spaces generally, see Molly Shaffer Van Houweling, Sidewalks, Sewers, and State Action in Cyberspace (Nov. 5, 2001) (unpublished manuscript), http://cyber.law.harvard.edu/is02/readings/stateaction-shaffer-van-houweling.html. For an articulation of the theory of virtual worlds specifically as company towns, see THE STATE OF PLAY: LAW, GAMES AND VIRTUAL WORLDS 99 (Jack M. Balkin & Beth Simone Noveck eds., 2006).

[135] Facebook reached over 750 million active users in July 2011, far surpassing the United States population. *Timeline*, FACEBOOK, http://www.facebook.com/press/info.php?timeline (last visited Oct. 23, 2011). Google-owned video properties (primarily YouTube) saw over 140 million unique viewers in October 2010. Press Release, comScore, comScore Releases October 2010 U.S Online Video Rankings (Nov. 15, 2010), *available at* http://www.comscore.com/Press_Events/Press_Releases/2010/11/comScore_Releases_October_2010_U.S._Online_Video_Rankings. LinkedIn is not far behind with over 120 million users as of August 2011. *About Us*, LINKEDIN, http://press.linkedin.com/about/ (last visited Oct. 23, 2011).

[136] *See, e.g.*, Green v. Am. Online, 318 F.3d 465, 472 (3d Cir. 2003); Langdon v. Google, Inc., 474 F. Supp. 2d 622, 632 (D. Del. 2007).

Green v. America Online, the Third Circuit rejected the plaintiff's claim that AOL is a state actor and thus bound by the First Amendment because it "provides a connection to the Internet on which government and taxpayer-funded websites are found" and "opens its network to the public."[137] Four years later, in *Langdon v. Google, Inc.*, the owner of two websites critical of government regimes, NCJusticeFraud.com and ChinaIsEvil.com, argued that Google should be considered a state actor due to its entwinement with public universities.[138] The District Court of Delaware rejected the state actor argument, finding no "sufficiently close nexus" between those universities and the content censorship by Google to justify treating Google's actions as those of the State.[139]

While the state action doctrine has not yet been invoked successfully against Internet companies,[140] recent instances of government-coerced censorship of privately-owned websites—for example, the cases of Craigslist and Wikileaks—beg for application of the doctrine.[141] The Supreme Court held in *Blum v. Yaretsky* that where a state uses "coercive power" to threaten a private actor to regulate in a certain way, the state has significantly entwined itself with the private company to trigger the doctrine.[142] Since the state AGs' threats to Craigslist directly resulted in its censoring content on its website, the state action test from *Blum* easily applies.[143] While a speaker like Wikileaks is not necessarily subject to the First Amendment's protections since it is not based in the United States, citizens unable to

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[137] *Green*, 318 F.3d at 472.

[138] Google had allegedly censored plaintiff's web content and advertisements. *Langdon*, 474 F. Supp. 2d at 631.

[139] *Id.* (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)).

[140] Hudson, *supra* note 130.

[141] *See id.* ("The case for protecting a subscriber's freedom of expression against a large Internet service provider is at least plausible and awaits a proper test case" (quoting ROBERT M. O'NEIL, THE FIRST AMENDMENT AND CIVIL LIABILITY 72 (2001) (internal quotation marks omitted))).

[142] *Blum*, 457 U.S. at 1004.

[143] *See* Calo, *supra* note 9 ("[T]hreats of criminal action motivated by disapproval of lawful speech constitute [clear] state action for First Amendment purposes.").

access foreign content due to censorship should be entitled to invoke their own rights via the state action doctrine.[144] In the future, if the trend of public entanglement with private Internet censorship continues, use of the state action doctrine is an ideal way for Internet users to use existing law to regain their rights to free speech.[145]

2. *The* PruneYard *Analysis: Affirmative Speech Guarantees in State Constitutions*

As first recognized in *PruneYard Shopping Center v. Robins*, otherwise known as the "shopping mall" case,[146] affirmative speech rights in state constitutions may be useful tools for citizens to use to assert their rights to free speech against private intermediaries.[147] In *PruneYard*, the Court decided that states are free to prevent private property owners from restricting speech when they essentially create a public forum.[148] The unanimous Court affirmed the California Supreme Court's decision to prevent shopping centers from imposing speech restrictions. The lower court's decision reasoned that, as opposed to the First Amendment's specific language *preventing Congress* from enacting a law abridging free speech,[149] the California state constitution grants citizens an *affirmative* right to free speech.[150] The Court recognized that while the United States Bill of Rights compels states to guarantee certain minimal rights through

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[144] *See infra* Part III.B.

[145] *See* Van Houweling, *supra* note 134.

[146] PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

[147] Nunziato, *supra* note 24, at 1167 ("If the Supreme Court persists in its unwillingness to translate First Amendment values to render the right to free expression meaningful in the new technological age, then states should interpret their own constitutions' free speech clauses—or, in the alternative, enact legislation—to provide individuals with meaningful rights to express themselves on the Internet.").

[148] *PruneYard*, 447 U.S. at 87–88.

[149] U.S. CONST. amend. I.

[150] Robins v. PruneYard Shopping Ctr., 592 P.2d 341, 346 (Cal. 1979) ("Every person may freely speak, write and publish his or her sentiments on all subjects . . . ." (quoting CAL. CONST. art. I, § 2)), *aff'd*, 447 U.S. 74.

incorporation, states are free to extend the bounds of those rights via their own state constitutions.[151]

The impetus for applying state constitutional protections to speech in shopping malls is that these spaces, though privately owned, have essentially become modern town squares.[152] Though the framers of the states' constitutions may not have envisioned this sort of private property and the opportunity for and value of speech there, courts have recognized the necessity of adapting these provisions to modern times.[153] In an average town, it is much more difficult to reach the masses in a park or on a sidewalk than in a shopping center.[154]

The same rationale holds true for the Internet.[155] The intensely market-driven nature of the Internet precludes the availability of purely public spaces as they were once understood—yet in many ways some of the most popular speech forums online resemble traditional public forums, possessing many of the qualities of the old town square.[156] Many people congregate in these areas, and in the fast-paced twenty-first century environment, virtual spaces are a much more feasible forum for advancing messages than most physical spaces.[157]

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[151] *PruneYard*, 447 U.S. at 81 (recognizing that states have a "sovereign right to adopt in [their] own Constitution[s] individual liberties more expansive than those conferred by the Federal Constitution").

[152] *See* Josh Mulligan, *Finding a Forum in the Simulated City: Mega Malls, Gated Towns, and the Promise of PruneYard*, 13 CORNELL J.L. & PUB. POL'Y 533, 554–55 (2004).

[153] *See id.*

[154] *See id.* ("Our constitutional right encompasses more than leafleting and associated speech on sidewalks located in empty downtown business districts. It means communicating with the people in the new commercial and social centers; if the people have left for the shopping centers, our constitutional right includes the right to go there too, to follow them, and to talk to them." (quoting N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 779 (N.J., 1994)) (internal quotation marks omitted)).

[155] *See, e.g.*, YORK, *supra* note 25, at 28.

[156] *See, e.g.*, *id.*; Nunziato, *supra* note 24, at 1162 (citing Am. Library Ass'n, Inc. v. United States, 201 F. Supp. 2d 401, 469 (E.D. Pa. 2002), *rev'd*, 539 U.S. 194 (2003)).

[157] See Nunziato, *supra* note 24, at 1120, for an articulation of the other

Though no court has held as such to date,[158] interactive websites should be considered the contemporary incarnation of public forums—public spaces where traditional free speech rights receive the highest level of protection.[159] As the Internet has increasingly become a staple of public life, courts must recognize the vast similarities between Internet spaces and shopping malls.[160] Applying the *PruneYard* rationale to the Internet, courts in states like California and New Jersey that grant citizens affirmative free speech rights[161] should allow them to exercise those rights to protect Internet users from unwarranted censorship, and courts in states that have rejected the *PruneYard* rationale in the shopping mall context should reconsider it in light of new technologies. Though a state-by-state approach to Internet regulation is not ideal, nationwide companies like Craigslist would have a stronger incentive to refuse government pressures to take down material if doing so would violate the rights of just some of its users.

B. Access

The Internet has transformed the ways in which people communicate and share information. In a survey, almost seventy-nine percent of adults around the world said they "either strongly agreed or somewhat agreed with the description of the

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"unprecedented speech-facilitating characteristics" of the Internet.

[158] The Supreme Court continues to recognize only streets, sidewalks, and parks as traditional public forums. See ARTHUR D. HELLMAN, WILLIAM D. ARAIZA & THOMAS E. BAKER, FIRST AMENDMENT LAW: FREEDOM OF EXPRESSION AND FREEDOM OF RELIGION 571 (2d ed. 2010), for a discussion of *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992), and its companion case *Lee v. International Society for Krishna Consciousness, Inc.*, 505 U.S. 830 (1992), in which "a bare majority" of the Court continued to adhere to the "tripartite classification approach" to the public forum doctrine.

[159] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44–45 (1983) (explaining that the standard for evaluating speech restrictions in "quintessential public forums," i.e. streets, sidewalks, and parks, is one akin to strict scrutiny).

[160] *See* YORK, *supra* note 25, at 28.

[161] *See* Mulligan, *supra* note 152, at 553–55.

Internet as a fundamental right."[162] Despite this sentiment, as of 2010, one in four Americans had no Internet access.[163] The United States government has addressed this problem by promising to provide affordable wireless Internet access to all Americans by 2020.[164] However, with so many private companies and institutions dictating the content that citizens may view, a wireless connection alone will not be enough to ensure that citizens have unfettered access.[165] In order to fulfill the noble goals of keeping Americans connected and fostering innovation, the law must afford stronger access-to-information rights to citizens.[166]

The Supreme Court has recognized that there is a First Amendment right to receive information.[167] Furthermore, part of Congress' policy reasoning behind Section 230 was that Internet "services offer users a great deal of control over information that they receive, as well as the potential for even greater

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[162] *Internet Access Is a 'Fundamental' Right*, BBC NEWS (Mar. 8, 2010, 8:52 GMT), http://news.bbc.co.uk/2/hi/8548190.stm.

[163] Priscilla Huff, *U.S. Seeks to Give All Americans High Speed Internet Access*, VOICE AM. (Jan. 5, 2010), http://www.voanews.com/english/news/usa/US-Government-Seeks-to-Give-All-Americans-Access-to-High-Speed-Internet-80698497.html.

[164] The American Recovery and Reinvestment Act allots $7.2 billion for the government's initiative to provide Internet access to every American. Steven Hseih, *5 New Tech Initiatives from Obama*, DISCOVERY NEWS (Dec. 30, 2010, 6:07 AM), http://news.discovery.com/tech/five-new-tech-initiatives-from-obama-101230.html.

[165] *See* Michael K. Powell, Chairman, Fed. Commc'ns Comm'n, Preserving Internet Freedom: Guiding Principles for the Industry, Remarks at the Silicon Flatirons Symposium: The Digital Broadband Migration (Feb. 8, 2004) (transcript *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf).

[166] *See id.* ("[C]onsumers should have access to their choice of legal content. Consumers have come to expect to be able to go where they want on high-speed connections, and those who have migrated from dial-up would presumably object to paying a premium for broadband if certain content were blocked. Thus, I challenge all facets of the industry to commit to allowing consumers to reach the content of their choice.").

[167] Susan Nevelow Mart, *The Right to Receive Information*, 95 LAW LIBR. J. 175, 176 (2003) (citing Martin v. Struthers, 319 U.S. 141, 143 (1943)).

control in the future as technology develops."[168] That so-called "control" is no longer evident when intermediaries take such an active role in policing online content.

Over the next decade, lawmakers must forgo censorship in order to truly act in the best interests of citizens in an information society; in the meantime, intermediaries must resist pressures to censor as they set their own rules and policies to govern Internet use.

1. Fair Access in Schools and Libraries

In order to ensure innovation, it is crucial that the next generation of leaders is properly prepared to think through twenty-first century problems and to navigate cyberspace.[169] Additionally, while access to information is important for lawmakers looking for sex abusers on Craigslist, and journalists look for documents released by Wikileaks, it is just as critical for the country's youth who are often in vulnerable situations and looking to learn more about a particular topic.[170]

Many policymakers are concerned with youth safety issues including cyberbullying and online predators, and are considering ways to mandate Internet safety education. While this goal is important, students need to learn not just how to use the Internet safely but how to use it productively in order to develop the skills that they need in order to thrive in modern society.[171] New technologies must be encouraged in the

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[168] Communications Decency Act, 47 U.S.C. § 230(a)(2) (2006).

[169] *See* Nat'l Econ. Council, *A Strategy for American Innovation: Driving Towards Sustainable Growth and Quality Jobs*, WHITE HOUSE, http://www.whitehouse.gov/administration/eop/nec/StrategyforAmericanInnovation (last visited Oct. 23, 2011) (listing education of youth in twenty first century knowledge and skills as a building block of innovation).

[170] Youth with physical or mental health issues who are uncomfortable disclosing details for in-person advice might find the anonymity of the Internet particularly desirable. *See* S. Monaghan & R.T. Wood, *Internet-Based Interventions for Youth Dealing with Gambling Problems*, 22 INT'L J. ADOLESCENT MED. HEALTH 113 (2010).

[171] *See* Matt Levinson & Deb Socia, *Moving Beyond One Size Fits All with Digital Citizenship*, PUBLIUS PROJECT (June 18, 2010), http://publius.cc/printpdf/moving_beyond_one_size_fits_all_digital_citizenship.

classroom rather than being shut out of it.[172] Content creation is a powerful tool for engaging students;[173] whether this means blogging, producing a video and uploading it to YouTube, or organizing a photostream in Flickr, students can learn important lessons. For example, students learn to evaluate media sources, to safeguard their privacy, and to avoid copyright infringement. All of these skills comprise "digital citizenship."[174]

Legislatures therefore should bolster Internet safety education mandates by requiring a media and information literacy curriculum that incorporates the websites many youth use outside of the school setting instead of blocking those platforms.[175] In schools and libraries that filter the Internet, students, teachers, and parents must demand accountability for blocked content.

2. Network Neutrality for All Citizens

In First Amendment law, prior restraints—where a government censor reviews a particular item of speech *before* publication—receive the strictest scrutiny.[176] Yet in the mobile space, where private corporations must approve applications before they may be released, executives at those companies have full discretion as to what kind of content is acceptable.[177]

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[172] *See id.*

[173] *See* Urs Gasser et al., *Information Quality, Youth and Media: A Research Update*, YOUTH MEDIA REP. (Aug. 30, 2010), http://www.youthmediareporter.org/2010/08/information_quality_youth_and.html.

[174] There are three models of citizenship that can be achieved in digital spaces: personal citizenship, which would include basic digital competencies like e-mail ethics and legal issues around file-sharing; participatory citizenship, which includes the use of social networking tools to enhance learning; and justice-oriented citizenship, where students use digital tools to solve problems. Levinson & Socia, *supra* note 171, at 4–5.

[175] *See id.* at 5–7; Gasser et al., *supra* note 173.

[176] Strict scrutiny review asks whether a statute is narrowly tailored to a compelling government interest and is the least speech-restrictive means of achieving that interest. *See, e.g.*, Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 65–66 (1963).

[177] *What's Next for Net Neutrality*, NAT'L CONF. FOR MEDIA REF. (Apr. 9, 2011), http://conference.freepress.net/session/480/what's-next-net-neutrality

Furthermore, ordinary individuals have little control when carriers decide to provide limited access to consumers, and there are no rules in place preventing them from doing so.[178]

In order to ensure a free and unfettered Internet, especially for those who rely on wireless technology to receive their information, the FCC must implement stronger network neutrality rules.[179] First, courts must reject any jurisdictional challenges to the FCC's authority to regulate the Internet.[180] Second, the rules in place must clearly prohibit paid prioritization of content, and must not leave loopholes for wireless providers to set up tiered content systems or otherwise discriminate against certain applications.[181] A lack of strong net neutrality rules risks serious harm to innovation.[182]

C. Transparency and Accountability

In digital worlds run by private actors, citizens deserve answers when intermediaries take down their content for undisclosed reasons.[183] A commitment to transparency will ensure that intermediaries can justify their content censorship decisions[184] and empower content creators who are otherwise

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(including the remarks of Markham Erickson, the Executive Director of Open Internet Coalition, who asserts that if Apple and its competitors were government actors, this unlimited discretion would constitute an unconstitutional prior restraint).

[178] *See supra* Part II.B.

[179] *See* Letter from Sean McLaughlin, Exec. Dir., Access Humboldt et al., to Julius Genachowski, Chairman, Fed. Commc'ns Comm'n et al. (Dec. 10, 2010), *available at* http://www.mediaaccess.org/wp-content/uploads/Dec%2010%20FCC%20Letter.pdf.

[180] *See id.*

[181] *See id.*

[182] *See id.*

[183] *See* YORK, *supra* note 25, at 29; Cynthia Wong, *Ask CDT: Global Internet Freedom*, CENTER FOR DEMOCRACY & TECH. (Mar. 25, 2011, 10:17 AM), http://www.cdt.org/ask-global-internet-freedom ("[C]ompanies should strive to apply terms of service in a consistent and transparent way, and take care to minimize any collateral negative impact on user rights.").

[184] *See* Joshua Urist, *Who's Feeling Lucky? Skewed Incentives, Lack of Transparency, and Manipulation of Google Search Results Under the DMCA*,

left in the dark when services reject their content.[185]

Perhaps the most controversial law generating concerns about transparency is the DMCA. The DMCA requires minimal information from copyright holders demanding takedowns of allegedly infringing content.[186] As a result, individuals seeking to upload content face an uphill battle if their use of copyrighted material is a fair use. This seriously deters online speech.[187] YouTube, one of the most frequent recipients of DMCA takedown requests, insists that it does not have the resources to obtain legal counsel to analyze every takedown request it receives[188]—but these intermediaries should require that copyright holders have accounted for fair use before removing users' material.[189] While YouTube makes a valid point that it cannot be expected to judge whether every video for which it receives a takedown notice is a fair use, the company can easily require copyright holders to present a sufficient showing in their takedown notices that they have at least considered the fair use defense.[190]

By holding copyright holders accountable for this analysis,

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1 BROOK. J. CORP. FIN. & COM. L. 209, 229 (2006) (arguing that requiring a complete public record of take-down notices under the DMCA would deter frivolous complaints).

[185] *See id.*

[186] *See* Digital Millennium Copyright Act, 17 U.S.C. § 512(c)(3)(A) (2006) (specifying no requirement that copyright holders explain why the allegedly infringing work is not a fair use).

[187] *See, e.g.*, Joseph M. Miller, Note, *Fair Use Through the* Lenz *of § 512 (c) of the DMCA: A Preemptive Defense to a Premature Remedy?*, 95 IOWA L. REV. 1697, 1707 (2010) ("The subjective standard of forming a good-faith belief imposes a very high standard of proof upon Internet users . . . [and] has led to a regime that favors copyright holders, often at the expense of Internet users.").

[188] *See* YouTube Letter, *supra* note 101.

[189] At least one federal court has held that this fair use analysis is required of copyright holders sending take-down notices under the DMCA. *See* Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150, 1156 (N.D. Cal. 2008).

[190] *See id.* at 1155–56 (conceding that "some evaluations of fair use will be more complicated than others," but most of the time the fair use value of a work can be assessed rapidly, and such an assessment is "consistent with the purpose of [the DMCA]").

intermediaries can help bolster user confidence that fair use content will not be frivolously removed.[191] Similarly, if an intermediary removes third party content for which it is presumably shielded from liability under Section 230, the author of the content deserves to know why the content has been removed. The same accountability requirements should apply to intermediaries making non-intellectual-property-related decisions to filter content; this would almost certainly reduce the willingness of service providers to take down objectionable content.[192]

IV. CONCLUSION

While many Americans believe that it is desirable to have a free flowing Internet,[193] the reality is that the Internet remains far from unregulated.[194] Even without much government regulation on the books, rules and policies are always in place on popular websites, many of which restrict free speech and citizens' access to valuable information. For over a century, American courts have wielded the First Amendment as a check on laws that arguably suppress too much speech. There is no similar tool to protect against speech suppression by private entities, which allows for much more speech regulation in privately owned spaces.

In order to guarantee that citizens have a voice in the privately run Internet spaces where they spend increasing amounts of time, the law must embrace new approaches to

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[191] *See* Urist, *supra* note 184, at 229.

[192] This accountability requirement would be more difficult to enforce under 47 U.S.C. § 230 as it stands today, since § 230(c)(2)(A) currently provides that "no provider . . . of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider . . . considers to be . . . objectionable, whether or not such material is constitutionally protected." 47 U.S.C. § 230(c)(2)(A) (2006). Therefore, this approach would be well served by an amendment to Section 230 to strike this provision.

[193] For a list of the members of the Save the Internet Coalition, a nonprofit dedicated to advancing Internet freedom, see *About Us*, SAVE THE INTERNET, http://www.savetheinternet.com/about (last visited Oct. 23, 2011).

[194] OPENNET INITIATIVE, UNITED STATES AND CANADA, *supra* note 19.

protecting digital rights: namely by carving out rights of access, speech, and transparency and accountability in online spaces. While the law has not been the main vehicle for Internet regulation thus far, it is now evident that moving away from the law and toward systems of private regulation without checks and balances is perhaps more dangerous than over-reaching laws because of the lack of judicial review.

In a nation as influential as the United States, it is essential that private intermediaries do not usurp the government's power to the point of stripping American citizens of their hard won rights to free expression. Hopefully, if the United States sets strong enough precedent for protecting citizens' digital rights, nations that operate more severe Internet censorship regimes will eventually follow suit.